

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 18-0120

JUSTIN ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: <u>Sept. 27, 2018</u>
	)	
AC FIRST, LLC	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA c/o	)	
AIG CLAIMS, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts, Joel S. Mills and Hunter B. Ratcliff (Pitts & Mills), Houston, Texas, for claimant.

Lauren E. Wilson and Zeba A. Nizami (Brown Sims), Houston, Texas, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order (2016-LDA-00771, 00772) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to

the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Ranger Land Systems (Ranger) in Kuwait and Afghanistan from 2009 to October 2013, when employer took over Ranger's contract; claimant continued working in Afghanistan for employer as a mechanic. Claimant submitted a resignation letter on March 31, 2014. EXs 7 at 1; 18 at 5. He returned to the United States on April 15, 2014, and began working for Union Pacific Railroad (Union Pacific) on May 5, 2014, where he continues to work as a machinist. Claimant sought mental health treatment on August 26, 2015, for symptoms consistent with Post-Traumatic Stress Disorder (PTSD); he was diagnosed with PTSD on September 23, 2015. CX 1 at 1, 5. He filed a claim under the Act, alleging a date of injury of April 15, 2014. EX 1. After initially denying the claim, employer provided medical benefits, but controverted claimant's entitlement to compensation. The parties agreed that claimant is not entitled to disability benefits from April 15, 2014 to August 25, 2015. Decision and Order at 3. Claimant sought continuing disability compensation thereafter. *Id.*

In his decision, the administrative law judge found that claimant has work-related PTSD, but he denied the claim for compensation. Decision and Order at 11, 15. The administrative law judge found that claimant voluntarily resigned his position with employer for reasons unrelated to the work incidents that resulted in his PTSD.<sup>1</sup> *Id.* at 13. The administrative law judge found that since claimant's PTSD did not influence his decision to pursue domestic employment, claimant's decreased wage-earning capacity with Union Pacific is unrelated to his work injury. *Id.* at 13-14. The administrative law judge concluded, therefore, that claimant did not establish that he is disabled "because of injury," pursuant to Section 2(10) of the Act, 33 U.S.C. §902(10). *Id.* at 14.<sup>2</sup>

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<sup>1</sup> The administrative law judge noted that claimant experienced frequent explosions in Afghanistan and witnessed injured and deceased soldiers. Decision and Order at 13 n.4; *see* EX 18 at 6-10. The administrative law judge found that claimant experienced nightmares, sweating, trouble sleeping, and alcohol dependence soon after he began working for Union Pacific. Decision and Order at 14.

<sup>2</sup> Accordingly, the administrative law judge found moot the contested issues of nature and extent of claimant's disability, maximum medical improvement, average weekly wage, and loss of wage-earning capacity. Decision and Order at 14.

On appeal, claimant challenges the denial of compensation. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred by relying on his voluntarily leaving his overseas work for employer to deny compensation. Claimant avers that to establish a prima facie case of total disability he need only show he is unable to return to his usual employment with employer because of his work-related PTSD. For the reasons stated in *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018),<sup>3</sup> *rev'g* 50 BRBS 9 (2016), which was issued after the administrative law judge's decision, we agree and we remand the case for further findings.

Section 2(10) of the Act states:

“Disability” means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

33 U.S.C. §902(10). In *Moody*, the claimant was disabled after surgery for a work-related injury, which he chose to undergo shortly after he voluntarily retired. He sought temporary total disability compensation for the approximately eight-week period of his recuperation from surgery. The United States Court of Appeals for the Fourth Circuit stated that the ordinary meaning of “incapacity” is “inability” and that economic harm under the Act has been defined as the lost capacity to earn wages, not actual economic loss. *Moody*, 879 F.3d at 99, 51 BRBS at 467(CRT), citing *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The court held that the law compensates for deprivation of economic choice when it is caused by a workplace injury. *Id.*, 879 F.3d at 99-100, 51 BRBS at 47(CRT). Accordingly, the court held that the relevant inquiry is only whether claimant's work injury precludes his return to his usual work, irrespective of any choice he made to not work. *Id.*, 879 F.3d at 100, 51 BRBS at 47(CRT). As the claimant was unable to work post-surgery because of his work-related injury, the court held that he is entitled to compensation during this recovery period. *Id.*, 879 F.3d at 101, 51 BRBS at 48(CRT). In *Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018), the United States Court of Appeals for the Ninth Circuit agreed that the plain language of Section 2(10) contemplates an award of compensation when the claimant's injury causes the inability to work, notwithstanding the claimant's retirement.

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<sup>3</sup> *Accord Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018), *rev'g* 51 BRBS 7 (2017).

Although this case involves a claimant who continued to work after leaving the employment that caused his injury, the courts' interpretation of Section 2(10) is applicable here.<sup>4</sup> Thus, the pertinent inquiry in this case is whether claimant established his inability to return to work for employer due to his work-related PTSD. Although claimant voluntarily chose to obtain lower paying work in the United States, he alleges that his work injury precludes his returning to work for employer at higher wages than he is currently earning with Union Pacific. If claimant is unable to return to his former work for employer, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" due to his work-related PTSD.<sup>5</sup> *Moody*, 879 F.3d at 99-100, 51 BRBS at 47(CRT). Therefore, we vacate the administrative law judge's denial of disability benefits. We remand the case for the administrative law judge to address whether claimant established his prima facie case of total disability and, if necessary, any remaining contested issues. *See generally Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

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<sup>4</sup> Although this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the Board's remaining precedent, *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989), is inconsistent with *Moody* and *Christie* and is overruled on this point. *See also Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (case arising in the Fourth Circuit and thus implicitly overruled by *Moody*).

<sup>5</sup> We reject employer's contention that claimant's usual employment is his job at Union Pacific, for whom he worked when his PTSD became manifest, and that claimant, therefore, does not have a loss of wage-earning capacity. Claimant's usual work is his work with employer, who was the last covered employer to expose claimant to the hazardous conditions that caused his PTSD, and any loss of wage-earning capacity due to the PTSD, therefore, is properly based on his earnings with employer. *See generally Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd mem. sub nom. Blackwater Security Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge